Filed 7/6/10 Border Business Park v. City of San Diego CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

BORDER BUSINESS PARK, INC.,

Plaintiff and Appellant,

v.

CITY OF SAN DIEGO,

Defendant and Respondent.

E046940

(Super.Ct.No. 692794)

ORDER MODIFYING OPINION AND DENYING REHEARING

[NO CHANGE IN JUDGEMENT]

THE COURT

Respondent's petition for rehearing is denied. The opinion filed in this matter on June 7, 2010, is modified as follows:

1. The final sentence of the first full paragraph on page 14 is deleted. The following text is inserted in its place:

> However, we agree that the complaint adequately alleged that Border substantially complied with the claims presentation requirements.

2. The text beginning on page 21 with the subheading "The Amended Claim," and ending with the final paragraph beginning on page 23 and ending at the top of page 24 is deleted. The following text is inserted in its place:

Border Has Adequately Alleged Substantial Compliance

Border contends that the third amended complaint alleges that Border amended its Government Code claim in such a way that it substantially complied with the claims act. We agree that Border adequately alleged substantial compliance, albeit on a somewhat different basis than Border asserts.[12]

The claims presentation statutes are to be given a liberal interpretation to permit full adjudication on the merits, so long as the policies underlying the statutes are satisfied. (*Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority*, *supra*, 34 Cal.4th at p. 449.) The fundamental purpose of the statutes is to provide the public entity with sufficient information to enable it to investigate the claim. Consequently, the claim need only "'fairly describe what [the] entity is alleged to have done.' [Citations.]" (*Id*. at p. 446.) The third amended complaint alleges that after the City rejected Border's original claim because it failed to state a date, the City met with De La Fuente and his attorney to discuss the alleged insufficiency of the claim and possible settlement of the claim. It alleges that during that meeting, De La Fuente provided the City with a starting date, apparently an arbitrary one selected by De La Fuente merely to satisfy the City's request for a specific "date of incident." In addition, however, the letter from deputy city attorney Valderhaug, which is attached as an exhibit to the third amended complaint, reiterated the concerns De La Fuente expressed during the July 19 meeting and described in detail the actions the City took to investigate Border's complaints, as discussed in the meeting. He stated that he was able to investigate several of the complaints and had determined that they were unfounded for reasons which he described in detail. He stated that the City was continuing to look into other complaints and suggested that one or more additional

[12] As we discuss below, we need not decide whether the act of writing the alleged start date of January 1, 1995, on the original complaint amounted to an amended claim. Rather, we conclude on different grounds that Border's third amended complaint states a cause of action. (*Aubry*, *supra*, 2 Cal.4th at pp. 966-967.)

> meetings might help resolve the outstanding issues. Given that the City treated the original claim as a claim as presented, i.e., by issuing a notice of insufficiency pursuant to section 910.8, and that the subsequent meeting was allegedly undertaken to attempt to resolve the date deficiency in the original claim, the third amended complaint adequately alleges that by means of the information conveyed to the City during that meeting, Border provided the City with sufficient information to investigate its claim and substantially complied with the claims presentation requirements.[13] (*State of California v. Superior Court (Bodde)*, *supra*, 32 Cal.4th at p. 1245.) Accordingly, the demurrer was improperly sustained.
>
> The City contends, however, that the meeting and the correspondence between it and Border are not sufficient to constitute substantial compliance with section 910. It contends that case law holds that compliance requires a "single document" which constitutes the claim, and that because the public entity's actual knowledge of the facts underlying the claim are not a substitute for compliance, the public entity's own documents—i.e., Valderhaug's letter—cannot be used to demonstrate substantial compliance. We disagree.

3. The following text is inserted after the first full paragraph on page 27, which begins with "The City also contends that Border has made judicial admissions . . . .":

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[13] As we have previously noted, evidentiary facts found in attachments to a complaint may be considered on demurrer. (*Frantz v. Blackwell*, *supra*, 189 Cal.App.3d at p. 94.)

Other correspondence between Denny and the City, which Border provided in its opposition to the demurrer, adds further details as to what information Border provided to the City. As Border points out, in determining whether the trial court abused its discretion by denying leave to amend, we could consider this correspondence "as an indication of the facts the [plaintiff] would have alleged had it been granted leave to amend the complaint." (*Apple Valley Unified School Dist. v. Vavrinek, Trine, Day & Co.* (2002) 98 Cal.App.4th 934, 940 [Fourth Dist., Div. Two].) That consideration is unnecessary, in light of our conclusion that the demurrer should not have been sustained at all.

The City also contends that Border's failure to produce a copy of the claim with "January 1, 1995" inscribed upon it, along with the declaration of a city employee stating that no such inscribed claim exists in the city's files, is fatal to a finding of substantial compliance. We disagree. To the extent that this date is relevant, the issue is whether Border informed the City that January 1, 1995, was the start date for purposes of the claim, not whether that date was inscribed on the original claim. Border alleged that it did so inform the City's representatives at the meeting. This allegation is supported by the City's use of that date in its letter rejecting the claim.

Finally, the City states several times in its briefing that the allegations of the third amended complaint exceed the scope of the trial court's order because Border did not limit its amendments to allege only waiver based on the City's premature denial of the claim. It does not actually assert it as a basis for affirming the judgment, however. Nevertheless, it bears mentioning that the trial court's order granting leave to amend "only" to allege waiver based on the City's premature denial of the claim reflects the court's conclusion that Border's other theories of *waiver* (and its related contentions of abandonment, laches and estoppel) failed as a matter of law and that only the premature denial theory of waiver was arguably valid. The order did not preclude Border from amending the complaint to allege new or different facts demonstrating *compliance* with the claims act as an alternative to waiver.

The opinion remains otherwise unchanged. This modification does not effect a change in the judgment.

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/s/ McKinster
Acting P.J.

We concur:

/s/ Richli
J.

/s/ King
J.